

Environmentalists Threaten New Suit Over Latest EPA Denial Of CWA Petition

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Environmentalists are threatening to file a new lawsuit over EPA's latest denial of a petition seeking agency action over an inadequate state water quality program, creating a new test for how much discretion the agency has to allow states to retain control of their delegated Clean Water Act (CWA) programs.

The latest threat comes after EPA last week denied a petition from eight Alabama environmental groups that sought to force the agency to develop dozens of new water quality criteria for toxics for the state, arguing that officials have not had enough time to evaluate updated science and that the agency generally prefers for states to take the lead.

"The EPA concludes that the use of federal rulemaking authority is not the most effective or practical means of addressing your concerns at this time," agency water chief David Ross told environmentalists in [an April 10 letter](#).

"Accordingly, the EPA is exercising its discretion to allocate its resources in a manner that supports state activities to accomplish our mutual goals of protecting human health and aquatic life," Ross told David Ludder, the groups' attorney.

In their [Feb. 3, 2017, petition](#), environmentalists asked EPA to step in and use its CWA discretionary authority to prepare and publish water quality criteria for priority toxic pollutants, alleging that Alabama's are not sufficient to protect aquatic life, fishing, and shellfishing, and are not sufficient to protect human consumption of fish, shellfish and water.

But now that EPA has denied their petition, environmentalists are threatening to sue EPA over the petition denial. In a statement to *Inside EPA*, Ludder criticizes EPA's denial and says the environmental groups may file a lawsuit against Administrator Scott Pruitt seeking to overturn the decision.

"Congress directed States to update criteria for toxic pollutants every time they adopt new or revised water quality standards," Ludder said.

"Alabama repeatedly failed to do this. As a result, Alabama's criteria for toxic pollutants are incomplete and outdated and the health of Alabama water users and fish consumers are not sufficiently protected. EPA knows that Alabama's criteria for toxic pollutants are not adequate to protect health and that Alabama has failed and refused to update its criteria. Despite this knowledge, EPA chooses to do nothing."

The petition is one of several where environmentalists have sought to force EPA to address concerns about the adequacy of state water pollution programs. For example, several of the same groups in this case are suing EPA in the U.S. Court of Appeals for the 11th

Circuit, alleging that the agency's denial of their petition seeking to revoke Alabama's CWA permitting authority was unlawful.

In that case, *Cahaba Riverkeeper v. EPA*, which is tentatively slated for oral argument in July, environmentalists allege that EPA's denial of their petition was unlawful in part because it exceeded the agency's discretion on determining when it must withdraw delegated permitting authority.

But EPA is defending its decision to work with Alabama on improving its permit program rather than revoking its authority, arguing the CWA provides broad discretion in how to respond to such petitions and that requiring automatic withdrawal proceedings is contrary to cooperative federalism.

'Reasonable Period Of Time'

At a time when EPA Administrator Scott Pruitt has made scaling back EPA oversight of state permit and other delegated programs a top priority, such cases provide an important test of the agency's power to address concerns with inadequate state programs.

In the case over Alabama's water quality standards, EPA's Ross reiterates that the agency's long-standing policy has been for states to have primary responsibility for developing and adopting water quality standards (WQS) for their jurisdictions while EPA provides guidance and oversight.

“Here, where a state is in the process of reviewing and revising its WQS and the EPA anticipates the state will submit new or revised standards in the near future, the EPA prefers the 'states-first' statutory process envisioned under CWA sections 101(b) and 303(c)(3) over the EPA exercising its backstop role under section 303(c)(4)(B),” the letter says. “This approach enables the EPA and states to work in partnership to effectively utilize resources to address pollution and assist in the state's adoption of new and revised criteria.”

Ross says EPA intends to assess the progress made by the Alabama Department of Environmental Management (ADEM) “and is not foreclosing the possibility that there may be circumstances where, despite the best efforts of all, Agency action may be appropriate.”

But EPA in its denial says the state is working to address many of the pollutants highlighted by environmentalists and that ADEM should be given more time.

“States and authorized tribes need a reasonable period of time to consider any new data and the latest science, as well as time to review and assess published EPA guidance including national recommended human health and aquatic life criteria for various pollutants,” Ross writes. “Most of the recommended criteria your Petition identifies were only published by the EPA in the last three years.”

ADEM plans to review and consider new science during its 2018-2020 triennial review, and Ross says EPA anticipates the state will provide its technical basis for any criteria it adopts as well as an explanation for any decision not to adopt criteria. This includes both methylmercury, which ADEM has been working to address through its total maximum daily

load program, and acrolein, for which the state has adopted human health criteria and has been in communication with EPA about consideration of aquatic life criteria, Ross says. --
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